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The Iceberg Emerged: Wisconsin's Extension of Risk Contribution Theory Beyond DES

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THE ICEBERG EMERGED: WISCONSIN'S EXTENSION OF RISK CONTRIBUTION THEORY BEYOND DES

I. INTRODUCTION

Noted twentieth century torts scholar Leon Green[1] once stated: "The beginning point of all tort liability is affirmative conduct, and the *first* step in establishing a defendant's liability is to identify him and connect his conduct with the victim's injury."[2] But what happens in cases where that first step cannot be realized because the tortfeasor is unknown? This was the case with a young Milwaukee boy named Steven Thomas who, when only fourteen months old, began exhibiting symptoms of lead poisoning.[3] Steven's doctor found that the cognitive defects Steven suffered from were common of children poisoned by lead.[4] In Steven's case, the damage was permanent.[5] He will require lifelong care and now faces greater risks of developing complications in the future, including such problems as kidney disease.[6] Steven's doctor concluded that the high levels of lead in Steven's blood stemmed *exclusively* from ingesting the lead-based pigment found in paint.[7] The City of Milwaukee Health Department documented lead violations at the home where Steven and his family lived when he first began exhibiting symptoms of lead poisoning.[8] The Thomas family lived at two different residences in Milwaukee, each residence being over one

1. Leon Green (1888–1979), former Dean of Northwestern University School of Law, exemplified the Realist movement in legal scholarship in the early to mid-twentieth century. He believed legal theories should be practical and workable rather than abstract and metaphysical. Green's propositions for revisions in theories of causation and duty in negligence law were some of the most original and influential of this era. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 75–78 (2003); *see* Leon Green Papers, 1929–1947, Northwestern University School of Law, http://www.library.Northwestern.edu/archives/findingaids/green_leon.pdf (last visited Nov. 3, 2006).

2. Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 546 (1962).

3. Thomas v. Mallett, 2005 WI 129, ¶ 6, 285 Wis. 2d 236, ¶ 6, 701 N.W.2d 523, ¶ 6.

4. *Id.* ¶ 11, 285 Wis. 2d 236, ¶ 11, 701 N.W.2d 523, ¶ 11.

5. *Id.*, 285 Wis. 2d 236, ¶ 11, 701 N.W.2d 523, ¶ 11.

6. *Id.*, 285 Wis. 2d 236, ¶ 11, 701 N.W.2d 523, ¶ 11.

7. *Id.*, 285 Wis. 2d 236, ¶ 11, 701 N.W.2d 523, ¶ 11(emphasis added).

8. *Id.* ¶¶ 7–8, 285 Wis. 2d 236, ¶¶ 7–8, 701 N.W.2d 523, ¶¶ 7–8.

hundred years old.[9] In each residence, there were several layers of lead paint that had been applied over the years.[10] The Thomas family was unable to identify the precise producer of the white lead carbonate pigment Steven ingested; therefore, Steven could not meet the first crucial step in establishing liability.[11]

The problem of lead poisoning remains a great and dangerous concern. Around 38 million homes in the United States still contain some lead paint,[12] and in 2004, about 3,300 children under the age of six suffered lead poisoning in Wisconsin.[13] In young children, lead poisoning can result in reduced intelligence quotient ("IQ"), learning disabilities, attention deficit disorders, stunted growth, and kidney damage.[14] With the potential for such severe damage, it is imperative that the courts fashion relief for plaintiffs who are injured by the actions of the tortfeasor, even if the tortfeasor is unknown.

In the 1970s, a rash of lawsuits against manufacturers of the drug Diethylstilbestrol ("DES"), which was given to women as a miscarriage preventative, forced the issue of how to deal with the missing tortfeasor to the legal forefront.[15] The Wisconsin Supreme Court also faced this issue with DES in *Collins v. Eli Lilly Co.*[16] and drafted a solution: a risk contribution theory that utilized the state statute for comparative negligence and apportioned liability based on the proportion of the market a manufacturer held when the plaintiff was injured.[17] Scholars viewed these theories of liability based on market share[18] with great potential, surmising the DES cases would be the "tip of an iceberg."[19] The Wisconsin Supreme Court acknowledged that risk contribution

9. *Id.*, 285 Wis. 2d 236, ¶¶ 7–8, 701 N.W.2d 523, ¶¶ 7–8.

10. *Id.* ¶ 12, 285 Wis. 2d 236, ¶ 12, 701 N.W.2d 523, ¶ 12.

11. *Id.* ¶ 27, 285 Wis. 2d 236, ¶ 27, 701 N.W.2d 523, ¶ 27; *see* Green, *supra* note 2, at 546.

12. National Safety Council – Lead Poisoning, http://www.nsc.org/library/facts/lead.htm (last visited Nov. 3, 2006).

13. Jamaal Abdul-Alim, *One Lead-Paint Defendant Settles*, MILWAUKEE J. SENTINEL, Oct. 27, 2005, at 1B.

14. National Safety Council – Lead Poisoning, *supra* note 12.

15. Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151, 159 (2004).

16. Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

17. *Id.* at 197–99, 342 N.W.2d at 52–53.

18. Please note for the purposes of this Comment there is no material difference between the theory of "market share liability" and "risk contribution theory." Risk contribution theory is simply the terminology used by the Wisconsin courts.

19. Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 1007 (1978).

theory could be used for other goods "factually similar" to DES,[20] yet failed to define what "factually similar" meant.[21] Despite high hopes for using this theory, for many jurisdictions over twenty-one years after *Collins*, "the iceberg remains almost completely submerged."[22] While many jurisdictions outside of Wisconsin have had the opportunity to adopt some form of market share liability, only a minority of jurisdictions chose to adopt it, and those who have adopted it usually only entertained the theory for DES cases.[23] In the twenty-one years after the Wisconsin Supreme Court decided *Collins*, Wisconsin courts faced only two cases where risk contribution theory was argued for a product other than DES, and both of these cases terminated with the court of appeals failing to extend risk contribution theory.[24]

It was not until 2005 that the Wisconsin Supreme Court once again faced the opportunity to extend risk contribution theory for a product beyond DES. The case of the young Milwaukee boy, Steven Thomas, provided the ideal situation for the Wisconsin Supreme Court to revisit the issue of risk contribution theory for a product beyond DES: lead carbonate. In *Thomas v. Mallet*,[25] the Wisconsin Supreme Court boldly extended this useful theory beyond the scope of DES in a way that most jurisdictions refused to do for fear of disrupting the traditional theory of fungibility.[26] Rather than arguing fungibility was unnecessary[27] or completely abolishing the need for fungibility, the court restated and refined the meaning of fungibility, creating a usable test for risk contribution theory.[28] The court needed a situation "factually similar" to *Collins* to extend the theory;[29] yet, the court failed to truly define

20. *Collins*, 116 Wis. 2d at 191, 342 N.W.2d at 49.

21. *See* Rostron, *supra* note 15, at 170 (stating that the court examined the possibility of applying risk contribution theory to products other than DES, but it failed to explain what exactly that meant).

22. *Id.* at 215.

23. LAWRENCE G. CETRULO, 1 TOXIC TORTS LITIGATION GUIDE § 3:11 (2005) ("Variations of the market share theory have been adopted in a minority of jurisdictions. The theory has found little acceptance, however, outside of the unique fact situation presented by the marketing of DES.").

24. *See* Rogers v. AAA Wire Prods., Inc., 182 Wis. 2d 263, 513 N.W.2d 643 (Ct. App. 1994); Drezdzon v. AAA Ins. Co., No. 84-273, 1984 WL 180237 (Wis. Ct. App. Oct. 12, 1984). Neither of these cases were appealed to the Wisconsin Supreme Court.

25. 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

26. *See generally* Rostron, *supra* note 15.

27. *Id.*

28. *Thomas*, 2005 WI 129, ¶¶ 142–44, 285 Wis. 2d 236, ¶¶ 142–44, 701 N.W.2d 523, ¶¶ 142–44.

29. Collins v. Eli Lilly Co., 116 Wis. 2d 166, 191, 342 N.W.2d 37, 49 (1984).

"factually similar" until *Thomas*. With *Thomas*, the court found that to be factually similar, one must show, among the other requirements for a prima facie case, that a product is fungible.[30] To be fungible, the product must be functionally interchangeable and physically indistinguishable, and there must be a uniformity of risk.[31] These elements will be considered based on the plaintiff's specific fact situation.[32] This theory expanded the definition of fungible enough to allow the theory to apply to goods beyond DES, specifically because of the broad way in which the court defined uniformity of risk. The uniformity of risk is based on the risk of the underlying defective component of the product, taking into consideration the specific situation.

As a result, risk contribution theory has an application beyond the DES cases to other products such as asbestos[33] and vaccines[34] that does not bend the definition of fungible beyond all possible recognition. The *Thomas* court made a sound extension of the *Collins* decision, and this extension will be a strong theory that will allow injured plaintiffs a new avenue to litigate cases they might not otherwise be able to litigate.

Also, by articulating a precise definition of fungibility, the Wisconsin Supreme Court has ensured that the "floodgates" of litigation will not be opened to any and all plaintiffs injured by any and all products in which the plaintiffs cannot identify the manufacturer.[35] In *Collins*, the court specifically looked at fungibility as "chemical identity,"[36] though

30. *See Thomas*, 2005 WI 129, ¶¶ 131, 137, 285 Wis. 2d 236, ¶¶ 131, 137, 701 N.W.2d 523, ¶¶ 131, 137.

31. *Id.* ¶¶ 142–44, 285 Wis. 2d 236, ¶¶ 142–44, 701 N.W.2d 523, ¶¶ 142–44.

32. *See id.* ¶ 145, 285 Wis. 2d 236, ¶ 145, 701 N.W.2d 523, ¶ 145.

33. Shirley H. Fang, Comment, Santiago v. Sherwin-Williams Co.: *Rejection of Market Share Liability in Lead-Based Paint Litigation*, 43 BUFF. L. REV. 725, 739–40 (1995).

34. Rostron, *supra* note 15, at 174–80.

35. A common criticism of the Wisconsin Supreme Court's decision in *Thomas* is that it will open the floodgate for plaintiffs to sue based on market share for any product in which the plaintiff cannot identify the manufacturer of the product. *See* Memorandum from Wis. Mfrs. & Commerce to Members of the Wis. Senate, Support S.B. 402—The Wisconsin Jobs Preservation Act (Nov. 7, 2005), *available at* http://www.wmc.org /printdisplay.cfm?ID=1155 [hereinafter Memorandum from Wis. Mfrs. & Commerce]. The Wisconsin Manufacturers & Commerce is the state's largest business organization. Mark Johnson, *Doyle Wields Veto on Lead Paint Bill*, MILWAUKEE J. SENTINEL, Jan. 7, 2006, at 1B.

36. Collins v. Eli Lilly Co., 116 Wis. 2d 166, 180, 342 N.W.2d 37, 44 (1984). Chemical identity is a tricky subject. For the *Collins* court, it was swayed by the fact DES is generally made by the same chemical formula and with this same chemical formula, DES created the same risk. *See id.* In contrast, white lead carbonate was comprised of three potential formulas, $4PbCO_3 2Pb(OH)_2 PbO$, $2PbCO_3 Pb(OH)_2$, and $PbCO_3$. *Thomas*, 2005 WI 129, ¶ 137 n.45, 285 Wis. 2d 236, ¶ 137 n.45, 701 N.W.2d 523, ¶ 137 n.45. Yet, the court considers the

what it acknowledged by the term "chemical identity" was the "generic" nature of DES, which made it interchangeable and indistinguishable as well as uniform in risk.[37] In the two cases that arose after *Collins*, the court of appeals utilized the *Collins* precedent, and in both cases, it refused to extend the theory of risk contribution because the products were not "factually similar" to DES; they failed to meet the definition of fungibility.[38] Because the court will not impose risk contribution theory on a product that cannot meet the standard of fungibility, it is unlikely the "floodgates" will open up to lawsuits on any and all products.

Yet, in the wake of *Thomas*, the Wisconsin legislature, feeling uncomfortable with the lengths to which the Wisconsin Supreme Court extended risk contribution theory, proposed a statute to severely limit the use of risk contribution theory.[39] However, with Wisconsin Governor Jim Doyle's veto and the legislature's inaction since the veto,[40] risk contribution theory still exists in full force to be used for the benefit of other plaintiffs and other products.

In the shadow of the Wisconsin Supreme Court's groundbreaking decision, Part II of this Comment will look at the path that led the Wisconsin Supreme Court to *Thomas* by exploring how the definition of fungibility evolved in Wisconsin law. Part III will describe the context of risk contribution theory in Wisconsin through a study of how the theory was applied in other jurisdictions and will then explore the genesis of the risk contribution theory in Wisconsin. Part IV will show how the Wisconsin Supreme Court found a "factually similar" situation to *Collins* and defined it as one where the product in question meets a three-prong test of fungibility, including the elements of functional

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uniformity of risk, being the lead, to be the same for each potential formula. *Id.* ¶ 140, 285 Wis. 2d 236, ¶ 140, 701 N.W.2d 523, ¶ 140. In this way, exact chemical identity is not necessary; however, depending on the product, it may or may not occur. Chemical identity is not dispositive of a fungible product, but factors into the element of uniformity of risk. The *Thomas* court expands this idea from *Collins*, in which the court just happened to be dealing with a chemically identical product at the time. The real issue is the risk created by the product. *See id.* ¶ 139, 285 Wis. 2d 236, ¶ 139, 701 N.W.2d 523, ¶ 139.

37. *See Collins*, 116 Wis. 2d at 180, 342 N.W.2d at 44. The court acknowledged DES prescriptions could be filled with DES from any manufacturer. *Id.* The court also acknowledged DES created a uniformity of risk. *Id.* at 191, 342 N.W.2d at 49.

38. *See* Rogers v. AAA Wire Prods., Inc., 182 Wis. 2d 263, 513 N.W.2d 643 (Ct. App. 1994); Drezdzon v. AAA Ins. Co., No. 84-273, 1984 WL 180237 (Wis. Ct. App. Oct. 12, 1984).

39. Wisconsin Jobs Preservation Act, S.B. 402, 97th Leg., Reg. Sess. (Wis. 2005).

40. *See* Johnson, *supra* note 35. Governor Doyle vetoed the bill on Friday, January 6, 2006. *Id.* As of this writing, the Wisconsin Senate and Assembly have not overridden this veto.

interchangeability, physical indistinguishability, and uniformity of risk.[41] Part V will address the effect of the statute proposed in response to *Thomas* on risk contribution theory in Wisconsin and will offer some remarks on the future of risk contribution in Wisconsin tort law.

II. EVOLVING DEFINITIONS OF FUNGIBILITY

A. Fungibility in Goods: The Uniform Commercial Code

Commercial law reflects a more traditional view of fungibility that considered the likeness of goods based on their nature and usage. The fungibility of certain goods is important not only in deciding tort cases under risk contribution theory, but appears in cases involving sales disputes under Wisconsin's version of the Uniform Commercial Code ("UCC").[42] Wisconsin's UCC defines fungible goods as those goods equivalent to another like unit based on the goods' nature or usage or, if by agreement, certain goods that are treated as equivalents.[43] Though fungibility under the Wisconsin UCC is not necessarily indicative of how the term will be used in cases of products liability, it illuminates how the legislature considered the definition of fungibility for goods.

B. Fungibility in Products: An Expanding Definition for Torts

Traditionally, fungibility in commercial law considered the equivalence of goods based on their nature and usage.[44] When applying fungibility in torts, the courts break down fungibility into three definitions, each used in different forms by different courts; this process began in the DES cases.[45] The definitions include (1) functional interchangeability, (2) physical indistinguishability, and (3) uniformity of risk.[46] The first two definitions reflect the definition of fungibility encapsulated in the UCC—a likeness of goods based on nature and usage.[47] It is the addition of the third idea, uniformity of risk, which is the key to fungibility in torts.[48]

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41. *See* Rostron, *supra* note 15, at 163–67.

42. *See, e.g.*, Badger Produce Co. v. Prelude Foods Int'l, Inc., 130 Wis. 2d 230, 240, 387 N.W.2d 98, 103 (Ct. App. 1986) (considering the fungibility of boxes under Wisconsin's Uniform Commercial Code).

43. WIS. STAT. § 401.201(17) (2003–2004).

44. *See id.*

45. *See* Rostron, *supra* note 15, at 163–67.

46. *See id.*

47. *See* § 401.201(17).

48. *See* Rostron, *supra* note 15, at 166.

The Wisconsin Supreme Court introduced the idea of fungibility in the context of DES in *Collins v. Eli Lilly Co.*[49] The court described DES as fungible, in a "'generic' form, which did not contain any clearly identifiable shape, color, or markings. DES was a fungible drug produced with a chemically identical formula, and often pharmacists would fill DES prescriptions from whatever stock they had on hand, whether or not a particular brand was specified in the prescription."[50] This court recognized that DES was both functionally interchangeable and physically indistinguishable; yet, unlike other goods considered under the UCC definition of fungible, DES also created a uniformity of risk, with each manufacturer contributing to the risk of injury to the public.[51]

C. *Fungibility in Products beyond DES: Exploring Definitions in* Thomas v. Mallett

In *Thomas*, the Wisconsin Supreme Court explored definitions of fungibility.[52] The court defined "functionally interchangeable" as dependent on the function at issue and stated that "functionally interchangeable" is significant because it may be the very reason why a product is difficult to identify.[53] Like "functional interchangeability," the court identified "physically indistinguishable" as highly contextual and dependent on the degree of physical similarity of the products.[54] This meaning of fungible is also important because it causes the initial problem of product identification, giving rise to the application of risk contribution theory.[55]

"Uniformity of risk" posed the greatest definitional problem for the *Thomas* court. Because the defective product created a risk of harm, this definition of fungibility is the one absolutely crucial for use of risk contribution or market share theory.[56] The Wisconsin Supreme Court found that "uniformity of risk" depended on the "unit" of the good considered.[57] For example, although each milligram of DES created the

49. 116 Wis. 2d 166, 342 N.W.2d 37 (1984).
50. *Id.* at 180, 342 N.W.2d at 44.
51. *Id.* at 191, 342 N.W.2d at 49.
52. *See* 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.
53. *Id.* ¶ 142, 285 Wis. 2d 236, ¶ 142, 701 N.W.2d 523, ¶ 142.
54. *Id.* ¶ 143, 285 Wis. 2d 236, ¶ 143, 701 N.W.2d 523, ¶ 143.
55. *Id.*, 285 Wis. 2d 236, ¶ 143, 701 N.W.2d 523, ¶ 143.
56. *See* Rostron, *supra* note 15, at 168.
57. *Thomas*, 2005 WI 129, ¶ 144, 285 Wis. 2d 236, ¶ 144, 701 N.W.2d 523, ¶ 144; Rostron, *supra* note 15, at 166.

same "amount" of risk, each DES pill did not because of the different pill dosages.[58] The court concluded that "strict chemical uniformity" does not make a substance fungible;[59] therefore, uniformity of risk remains broader, including a similar, underlying risk rather than identical "amounts" of risk in the product.[60]

The *Thomas* court articulated a definition of fungibility first found in *Collins* that incorporated the traditional view of fungibility found in the UCC with the idea of uniformity of risk, which was so vital to the DES cases. These three definitions become elements of a larger definition of fungibility necessary for use of risk contribution theory. Prior to *Thomas*, the Wisconsin courts had considered the definition of fungibility with goods. The Wisconsin Court of Appeals described gravel as fungible because of the similarities and indistinct nature of the rock fragments.[61] This use of "fungible" seems to be attuned to the definition of "physically indistinguishable" because of the extreme similarity between the goods. In considering component parts of a potentially defective ladder, the Wisconsin Supreme Court used the word "fungible" in the context of "generic."[62] This use is closer to the "functional interchangeability" definition because each part is a substitute for another part.

Though the court implicitly defined fungibility by its use in those cases, the situations did not warrant the use of risk contribution theory because the tortfeasor was known. Moreover, while rocks and ladders may be physically indistinguishable and functionally interchangeable, they do not create a uniformity of risk. It was not until the first DES case, *Collins*, that the court had the opportunity to craft risk contribution theory for a defective product made by an unknown tortfeasor that created a special, uniform risk.[63] The court in *Collins* recognized that DES created a uniform risk to the public because of its underlying ingredient, and all producers of DES contributed to this risk.[64]

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58. *Thomas*, 2005 WI 129, ¶ 144, 285 Wis. 2d 236, ¶ 144, 701 N.W.2d 523, ¶ 144.

59. *Id.*, 285 Wis. 2d 236, ¶ 144, 701 N.W.2d 523, ¶ 144.

60. *See id.*, 285 Wis. 2d 236, ¶ 144, 701 N.W.2d 523, ¶ 144.

61. Konyn v. City of Marinette, No. 80-2220, 1981 WL 138676, at *2 (Wis. Ct. App. July 7, 1981).

62. Strasser v. Transtech Mobile Fleet Serv., Inc., 2000 WI 87, ¶ 44, 236 Wis. 2d 435, ¶ 44, 613 N.W.2d 142, ¶ 44.

63. Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

64. *Id.* at 191 n.10, 342 N.W.2d at 49 n.10.

III. APPORTIONMENT OF RISK BASED ON MARKET SHARE: A CHAOTIC BACKDROP FOR *THOMAS*

In situations where the tortfeasor is unknown, the Wisconsin courts will consider utilizing risk contribution theory in order to provide a remedy to the injured plaintiff if the product is fungible. The *Collins* court rejected other tests for apportioning liability with multiple tortfeasors, such as concerted action and enterprise liability.[65] Weighing the interests of the "innocent plaintiff" against the manufacturers of DES, the court found that it was better for the DES manufacturers to bear the cost of the injury than the plaintiff.[66] The court found that because the defendant provided a product that created the risk of injury to the plaintiff, the defendant should bear the cost based on the risk it put into the market.[67] In considering comparative fault between the multiple tortfeasors, the court considered certain factors which could reduce or increase liability.[68] The court opened the possibility that risk contribution theory could be used for other products that were "factually similar" to DES;[69] yet, the *Collins* precedent left the lower courts to interpret what products and situations were "factually similar" to DES.

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65. *Id.* at 182–87, 342 N.W.2d at 45–47. Concerted action is a theory of liability in which multiple tortfeasors are acting in pursuit of a common plan. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979). Enterprise liability is an industry-wide variant of concerted action in which "each defendant that participates in perpetuating and using the inadequate standard has contributed to and is liable for the plaintiff's injury." *Collins*, 116 Wis. 2d at 186, 342 N.W.2d at 47.

66. *Id.* at 192, 342 N.W.2d at 49.

67. *Id.* at 191–92, 342 N.W.2d at 49.

68. *Id.* at 199–200, 342 N.W.2d at 53. The court considers these factors, that are illustrative and not exclusive:

> [(1)] whether the drug company conducted tests on DES for safety and efficacy in use for pregnancies; [(2)] to what degree the company took a role in gaining FDA approval of DES for use in pregnancies; [(3)] whether the company had a small or large market share in the relevant area; [(4)] whether the company took the lead or merely followed the lead of others in producing or marketing DES; [(5)] whether the company issued warnings about the dangers of DES; [(6)] whether the company produced or marketed DES after it knew or should have known of the possible hazards DES presented to the public; and [(7)] whether the company took any affirmative steps to reduce the risk of injury to the public.

Id. at 200, 342 N.W.2d at 53.

69. *Id.* at 191, 342 N.W.2d at 49.

A. *Attempts to Extend Risk Contribution Theory after* Collins

The court of appeals faced the possibility of extending the *Collins* rationale and rejected risk contribution theory in *Drezdzon v. AAA Insurance Co.*[70] In *Drezdzon*, the plaintiff was injured when a metal box slid off a forklift and struck his foot.[71] Despite the fact the plaintiff knew which particular tote box caused his injury at the time it struck him,[72] he somehow lost track of the box and, therefore, could not remember the box or identify who manufactured the box; thus, he named two potential manufacturers as defendants.[73] The plaintiff asked the trial court for a continuance of the hearing on defendants' motion for summary judgment because he wished to develop a factual record to show how his case was "factually similar" to DES in *Collins*.[74] The trial court denied plaintiff's request, and the court of appeals affirmed.[75] The court of appeals found the facts of this case were "materially different" from *Collins* because (1) the injury occurred immediately; (2) the plaintiff knew which particular metal box caused the injury at the time it occurred; therefore, he had a "reasonable opportunity" to secure the box and attempt to discover its manufacturer; (3) the plaintiff only had two possible defendants rather than a large market; and (4) the product was non-generic and could not be easily substituted.[76] The facts in *Drezdzon* simply did not rise to the level of those in the DES cases.[77]

The court of appeals again faced this issue in *Rogers v. AAA Wire Products, Inc.*[78] In *Rogers*, the plaintiff was injured when a wire bread cart collapsed as she was pulling it at the store in which she worked.[79] Because the cart was not retained, the plaintiff was unsure which bread cart injured her.[80] As a result, she named two defendants in a strict liability and negligence action.[81] Both defendants had manufactured bread carts provided to the store.[82] Once again, the court of appeals

70. No. 84-273, 1984 WL 180237 (Wis. Ct. App. Oct. 12, 1984).
71. *Id.* at *1.
72. *Id.* at *3.
73. *Id.* at *1.
74. *Id.*
75. *Id.* at *2.
76. *Id.* at *3.
77. *Id.*
78. 182 Wis. 2d 263, 513 N.W.2d 643 (Ct. App. 1994).
79. *Id.* at 266, 513 N.W.2d at 644.
80. *Id.*
81. *Id.*
82. *Id.* at 267–68, 513 N.W.2d at 644.

declined to extend *Collins* because the facts of *Rogers* were too factually dissimilar.[83] The court distinguished *Collins* by finding that just because the plaintiff in *Rogers* could not identify the source of the bread cart, this did not involve the important public policy issues that *Collins* raised.[84] The court seemed clear that the *Collins* analysis was meant for unique situations and that the plaintiff in *Rogers* did not have an "insurmountable obstacle" in identifying the source of the bread cart.[85]

In both *Drezdzon* and *Rogers*, the court of appeals faced situations in which there was an arguably unknown defendant tortfeasor and, therefore, faced the possibility of using risk contribution theory to fashion a remedy for the injured plaintiff. The question remained whether these goods and situations were "factually similar" enough to warrant the use of the *Collins* analysis. The court of appeals rightly refused to extend the *Collins* analysis in these two situations. In both *Drezdzon* and *Rogers*, the plaintiff did not know who manufactured the product that caused the plaintiff's injuries. Yet, neither alternative liability nor liability based on market share is appropriate for either the metal tote box or the bread cart. The plaintiffs in both cases attempted to use the *Collins* theory based simply on their inability to identify the negligent defendant. For risk contribution theory to work, there must be the possibility that each defendant is potentially liable.[86] In the case of the metal tote box, there was no indication that the product itself was defective in any way. The product merely slid off a forklift and struck the plaintiff in the foot.[87] Because the plaintiff could not secure the tote box that struck him, the manufacturer could not be identified.[88] Beyond the uncertainty of which tote box struck him, the plaintiff could not point to a defect in the tote box manufactured by the defendant, which would make this situation similar to DES. Rather, the defendant hoped to use risk contribution theory to excuse himself from further discovery and attempts to secure the tote box that struck him. It is evident that

83. *Id.* at 272, 513 N.W.2d at 646.

84. *Id.* at 272–73, 513 N.W.2d at 646.

85. *Id.* at 272, 513 N.W.2d at 646.

86. This is also true of alternative liability. Consider *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). In *Summers*, the plaintiff sustained injuries to his eye and face when he was shot while hunting. 199 P.2d at 2. He sued two different defendants, as each shot in the plaintiff's direction and the plaintiff was unsure which defendant's ammunition struck him. *Id.* Although the plaintiff was only shot by one defendant, each defendant was arguably negligent for aiming towards the plaintiff and putting him in danger. *Id.*

87. Drezdzon v. AAA Ins. Co, No. 84-273, 1984 WL 180237, at *1 (Wis. Ct. App. Oct. 12, 1984).

88. *Id.*

one box struck him and the other did not; therefore, one manufacturer, but not both, is potentially liable for his injuries. The court could not extend the *Collins* analysis in this case because there was no possibility both manufacturers contributed to his injury. Also, in the case of a product such as the metal tote box, it is more likely that a distinguishing feature could be found as manufacturers tend to mark their products for recognition, if not for their own protection.

A similar situation was present in *Rogers*. The plaintiff could not even identify which bread cart injured her, much less the manufacturer of the bread cart, because the store in which she worked used several different bread carts, and the bread cart that caused the injury was not retained.[89] If her injuries were caused by a defect in the bread cart, it is far from certain that each potential manufacturer who supplied bread carts to the store in which the plaintiff worked supplied defective carts. Once again, the court appropriately refused to extend *Collins* because each potential defendant did not necessarily create a risk.

Through *Drezdzon* and *Rogers*, the court of appeals created a marginally clearer picture of what a "factually similar" situation could be. The factual situation would be one with more than two potential defendants,[90] and there must be substantial difficulty in finding who manufactured the product that caused the injury.[91] Also, the court considered whether the issue had enough public policy importance to fashion a response.[92] It also seems a "factually similar" situation would be one involving a product capable of mass exposure to the public. The DES cases involved serious and permanent injuries to a large number of plaintiffs; conversely, the plaintiffs in *Drezdzon* and *Rogers* represent

89. *Rogers*, 182 Wis. 2d at 266, 513 N.W.2d at 644.

90. *See Drezdzon*, 1984 WL 180237, at *3 ("Unlike the situation in Collins involving hundreds of manufacturers, the undisputed facts in this case indicate that [plaintiff's] employer purchased tote boxes from only Powell and Republic, thus vastly reducing the number of defendants as to whom evidence had to be obtained."). Yet this analysis is not completely accurate. The issue is not the number of potential defendants, but the fact that each potential defendant created a risk. If only two potential manufacturers created a risk, then, like the two defendants in *Summers*, each should be liable for the plaintiff's injury. It is incorrect for the court to argue the number of defendants makes it easier to ascertain who created the risk. If each defendant did create a risk, then having less defendants simply reduces the risk of making a mistake concerning who caused the injury; it makes it no easier to determine who actually caused the injury. Therefore, the actual number of defendants should not factor into whether risk contribution can be used for a certain product; rather one should consider whether each defendant actually created a risk.

91. *Rogers*, 182 Wis. 2d at 272, 513 N.W.2d at 646.

92. *Id.* at 272–73, 513 N.W.2d at 646.

isolated instances that risk contribution theory was not meant to address.

Yet distinguishing *Drezdzon* and *Rogers* from *Collins* really rests on the lack of fungibility in the products.[93] In *Drezdzon*, the court found that the metal box was not fungible using the definitions of physical indistinguishability and functional interchangeability.[94] The boxes were not physically indistinguishable because, although they were "very similar," they were not "generic" like DES.[95] Also, the boxes were not functionally interchangeable because "companies filling orders for their products cannot freely substitute the products of other companies."[96] The *Rogers* court, rather than defining or considering fungibility, stated that risk contribution theory was probably not appropriate to decide the issue because the plaintiff could fairly easily identify the source of the cart that injured her.[97] Even so, it is unlikely the bread cart would be fungible because it is likely not physically indistinguishable (as most companies put some distinguishing mark on their products) or functionally interchangeable, nor does it create a uniformity of risk.

These situations, presented to the Wisconsin Court of Appeals in *Drezdzon* and *Rogers*, did not provide the court with a product in which it might have extended the *Collins* analysis beyond DES. In both cases, the plaintiffs could not distinguish who manufactured the injury-causing product, but the lack of fungibility in these products created a situation in which the potential defendants may not have even created a risk to the plaintiff. Without the fungibility of the products, the court could not extend risk contribution theory.

Therefore, attempts to extend risk contribution theory after *Collins* failed because each product presented did not reach the three-element standard of fungibility the court began to articulate in *Collins* and later clarified in *Thomas*.

B. The Backdrop for Thomas*: Conflicting Authority*

Before the Wisconsin Supreme Court even considered Steven Thomas' situation, jurisdictions across the United States had faced the problem of what to do with the theory of apportioning liability based on

93. *See Drezdzon*, 1984 WL 180237, at *3 (finding the metal tote boxes are similar but not generic as the product in *Collins*).

94. *See id.*

95. *Id.*

96. *Id.*

97. *Rogers*, 182 Wis. 2d at 272, 513 N.W.2d at 646.

market share. The theory first gained prominence in the California DES case, *Sindell v. Abbott Laboratories*.[98] After *Sindell*, many jurisdictions considered market share liability theories for a variety of products, though the majority of courts accepting the theory did so only for cases of injury due to DES.[99] Most courts either rejected the theory completely or rejected the theory for any product besides DES.[100] Because of the wide spread problems caused by lead paint poisoning,[101] lead paint seemed like a natural product for which to extend the theory of market share liability. Although several attempts were made in several different jurisdictions to extend market share liability to lead paint poisoning cases, each attempt failed.[102]

98. 607 P.2d 924 (Cal. 1980).

99. Santiago v. Sherwin-Williams Co., 782 F. Supp. 186, 190 & n.6 (D. Mass. 1992); CETRULO, *supra* note 23. Other jurisdictions have allowed for the possibility of market share liability for products other than DES, but these jurisdictions are in the minority and only have allowed market share liability in very specific, isolated situations. *See, e.g.*, Ray v. Cutter Labs., 754 F. Supp. 193, 196 (M.D. Fla. 1991) (allowing market share liability for products contaminated with HIV); Morris v. Parke, Davis & Co., 667 F. Supp. 1332 (C.D. Cal. 1987) (allowing market share liability for DPT vaccines).

100. *See, e.g.*, Gaulding v. Celotex Corp., 772 S.W.2d 66, 70–71 (Tex. 1989) (rejecting market share liability for asbestos cases); Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963, 972 (Pa. Super. Ct. 1985) (rejecting market share liability for defective tire rim assembly); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (rejecting market share liability for DES).

101. *See generally* National Safety Council – Lead Poisoning, *supra* note 12.

102. For example, in *Skipworth v. Lead Industries Ass'n*, 665 A.2d 1288, 1291–92 (Pa. Super. Ct. 1995), the plaintiff sued five former manufacturers of lead pigment, alleging she was injured from ingesting lead pigment but could not identify the manufacturer of the pigment she ingested. The court concluded that Pennsylvania has not adopted market share liability as a theory of recovery and use of the theory would be a "significant departure from the requirement that a plaintiff prove proximate cause." *Id.* Because the plaintiff could not identify the manufacturer of any of the lead pigment she ingested, she was unable to carry her burden of proof with respect to causation, and summary judgment was properly granted for the defendants. *Id.* Unlike *Skipworth*, the court in *Santiago v. Sherwin-Williams Co.*, accepted the general theory of market share liability but rejected the theory in cases involving lead-based paint. 782 F. Supp. at 192–93; *see also* Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 134 (Ill. App. Ct. 2005) (expressly rejecting market share liability); Brenner v. Am. Cyanamid Co., 732 N.Y.S.2d 799 (App. Div. 2001) (finding against the plaintiffs in their lead poisoning action because they could not identify the manufacturer).

IV. RISK CONTRIBUTION THEORY AFTER *THOMAS*: A USEABLE STANDARD OF FUNGIBILITY

A. The Substantially Similar Situation

The wealth of case law dealing with market share liability and when it should be applied created a muddled backdrop for the Wisconsin courts in deciding what products (if any) to which the *Collins* theory could be extended.[103] Subsequent to *Collins*, the Wisconsin courts explored two situations where plaintiffs argued a product was "factually similar" to DES.[104] The metal tote box and bread cart failed for several reasons, but fungibility remained a deciding factor. In both cases, the product in question did not meet the elements that DES fulfilled—the metal boxes were not functionally interchangeable or physically indistinguishable,[105] and the bread cart did not even rise to the level of unknown tortfeasor to warrant application of risk contribution theory.[106] Most importantly, neither the metal box nor the bread cart created a uniformity of risk, the most vital element for fungibility as applied to tort law. It was not until the court heard *Thomas* that it faced a situation it found "factually similar" to DES in *Collins*.[107]

Through the *Thomas* decision, the Wisconsin Supreme Court implicitly defined the crucial criteria for a product to be considered "factually similar" to DES in *Collins* and, therefore, warrant the use of risk contribution theory. The criteria hinges on fungibility. Lead carbonate, like DES, meets a definition of fungibility that combines all three necessary elements, including uniformity of risk (the most important element). The court found that lead carbonate was functionally interchangeable because all forms of the carbonate were lead pigments and the pigments had the same function—providing the "hiding power" of the paint.[108] The lead carbonates are also physically indistinguishable because they are virtually identical to the consumer when used in paint.[109] The court acknowledged that the analysis of "physical indistinguishability" is different with lead carbonate than with

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103. *See generally infra* Part IV.B.

104. *See* Rogers v. AAA Wire Prods., Inc., 182 Wis. 2d 263, 513 N.W.2d 643 (Ct. App. 1994); Drezdzon v. AAA Ins. Co., No. 84-273, 1984 WL 180237 (Wis. Ct. App. Oct. 12, 1984).

105. *See Drezdzon*, 1984 WL 180237, at *3.

106. *See Rogers*, 182 Wis. 2d at 272–73, 513 N.W.2d at 646.

107. Thomas v. Mallett, 2005 WI 129, ¶ 149, 285 Wis. 2d 236, ¶ 149, 701 N.W.2d 523, ¶ 149.

108. *Id.* ¶ 146, 285 Wis. 2d 236, ¶ 146, 701 N.W.2d 523, ¶ 146.

109. *Id.* ¶ 147, 285 Wis. 2d 236, ¶ 147, 701 N.W.2d 523, ¶ 147.

DES but broadened the analysis to depend on the context in which the product was being used and on who was using it.[110] Finally, the court found that lead carbonate met the definition of fungibility because there was a uniformity of risk.[111] This uniformity depended on the "common denominator" of lead—the underlying defective component.[112]

With the articulation of these three elements, the court created a more precise, usable definition of fungibility. Yet, of the three elements, the uniformity of risk remains the most broad, thus potentially allowing more goods to fall under its scope.[113]

B. The Expansiveness of Uniformity of Risk

In his dissent in *Thomas v. Mallett*, Justice Wilcox accused the majority of "drastically expand[ing] the . . . parameters of *Collins*" and "virtually eliminat[ing] the fungibility requirement."[114] He argued the incongruous conclusion that under the majority's rationale, any form of lead pigment is fungible with lead carbonate; therefore, the plaintiff in *Thomas* could sue manufacturers of lead pencils[115] or lead pipes because they all contain lead.[116] Justice Wilcox misunderstood and misstated the majority's argument. First, he misstated how the majority interpreted a "factually similar" situation to *Collins*. Even if lead pencils and lead pipes would pose a risk uniform to lead carbonate because of the underlying ingredient of lead, the *Thomas* plaintiff could not sue the manufacturers of lead pencils and lead pipes because they do not meet

110. *Id.*, 285 Wis. 2d 236, ¶ 147, 701 N.W.2d 523, ¶ 147.

111. *Id.* ¶ 148, 285 Wis. 2d 236, ¶ 148, 701 N.W.2d 523, ¶ 148.

112. *Id.*, 285 Wis. 2d 236, ¶ 148, 701 N.W.2d 523, ¶ 148.

113. Others argue the expansion of *Collins* is an isolated response to the problem of poisoning by lead paint and should not be expanded beyond the facts of *Thomas*. *See* Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 731 (2006). Judge Sykes acknowledges that the Wisconsin Supreme Court's action in expanding *Collins* could be extended to other products and industries, and she fears the consequences if the liability system is not expanded incrementally. *Id.* She fears rapid expansion or sweeping changes to causation requirements in other contexts could negatively affect the stability and predictability of Wisconsin's liability system and economy. *Id.* Judge Sykes argues such a sweeping change to the state's liability system should be addressed by the legislature as the court is limited by the facts and circumstances of the specific situation before it. *Id.*

114. *Thomas*, 2005 WI 129, ¶ 247, 285 Wis. 2d 236, ¶ 247, 701 N.W.2d 523, ¶ 247 (Wilcox, J., dissenting).

115. For the sake of argument, I am assuming "lead pencils" actually contain lead. Although the earliest "lead pencils" were thought to contain lead, it was later discovered that the pencils actually contained graphite. 9 THE NEW ENCYCLOPEDIA BRITANNICA 254 (15th ed. 1998).

116. *Thomas*, 2005 WI 129, ¶ 248, 285 Wis. 2d 236, ¶ 248, 701 N.W.2d 523, ¶ 248 (Wilcox, J., dissenting).

the other two requirements of fungibility—the products are not functionally interchangeable and physically indistinguishable. The majority found that these two factors are highly contextual, meaning that they are dependent on the situation in which the product is used.[117] The lead in lead pencils and lead pipes has a different function than the lead in the lead carbonate, and the degree of similarity in the products depends not just on the underlying ingredient, but also on the context in which it is used.[118] Any other interpretation would create an absurd result.

Second, the issue is not whether there is a "common denominator" with the good, but whether the "common denominator" creates a common risk. The majority admitted that fungibility as a term cannot be defined with "categorical precision."[119] Rather, how it is defined must depend on "the context of the injury, its cause, and the particular obstacles encountered in linking the causation to the possibly negligent defendants."[120] Therefore, "uniformity of risk" remains more expansive, depending on the circumstances. A good may still be fungible even if there are different amounts of the underlying defective component, as the fungibility stems from the risk of harm created by the underlying defective component. The *Collins* court focused on the fact that each DES manufacturer contributed to the creation of the risk of harm to those injured plaintiffs.[121] This did not relieve the plaintiffs of their burden to prove causation, but it acknowledged the importance of the underlying risk.[122]

Therefore, the *Thomas* majority did not eliminate the requirement of fungibility but refined it with a broader definition of uniformity of risk.

C. Expanding Risk Contribution Theory Beyond DES

Because the court effectively defined the "factually similar" situation by clarifying and expanding the definition of fungibility, it has allowed the risk contribution theory to grow beyond the original use in DES cases. In considering the expansion of risk contribution theory, the

117. *See id.* ¶ 145, 285 Wis. 2d 236, ¶ 145, 701 N.W.2d 523, ¶ 145 (majority opinion).

118. *See id.* ¶ 147, 285 Wis. 2d 236, ¶ 147, 701 N.W.2d 523, ¶ 147. Thus, the majority relies on a definition of fungibility in which all three elements must be met.

119. *Id.* ¶ 145, 285 Wis. 2d 236, ¶ 145, 701 N.W.2d 523, ¶ 145.

120. *Id.*, 285 Wis. 2d 236, ¶ 145, 701 N.W.2d 523, ¶ 145.

121. *See* Collins v. Eli Lilly Co., 116 Wis. 2d 166, 191 n.10, 342 N.W.2d 37, 49 n.10 (1984).

122. *See id.*

Wisconsin Supreme Court noted the potential definitions of fungibility proposed by University of Missouri-Kansas City School of Law Professor Allan Rostron.[123] Professor Rostron argued for the expansion of market share liability beyond the DES cases; however, he also argued fungibility was unnecessary in market share liability theory and hindered its expansion to other products.[124] Though Rostron correctly argued for the expansion of apportionment of liability based on market share, he mistakenly assessed the role of fungibility in the analysis. Rather than following Rostron's argument, the court used his exploration of differing definitions of fungibility and articulated a rule for risk contribution theory where fungibility is the cornerstone of the theory. Rostron argued that because courts could not get past the requirement of fungibility, proportional share liability would not expand beyond DES.[125] Rostron's argument was that fungibility was not essential to the use of proportional share liability theories and that liability could be allocated in other ways that take into account the different defendants creating different levels of risk.[126]

Yet, risk contribution theory can be expanded without discarding fungibility as a requirement for use. The Wisconsin Supreme Court has shown that, within the definition of fungible, different levels of risk can be taken into account. For deciding the initial prima facie showing that a tortfeasor could be a potential defendant, the uniformity of risk requires a showing of the "common denominator" of the risk-causing element. After the plaintiff makes this initial showing, the defendants still have the opportunity to exculpate themselves by showing that they could not have caused the injury.[127] The defendants who cannot exculpate themselves will then have negligence assigned based on Wisconsin's comparative negligence statute, which can take into account

123. Professor Rostron is a professor of law in the areas of tort law, products liability, constitutional law, and conflicts of law. Professor Rostron also served as Senior Staff Attorney at the Brady Center to Prevent Gun Violence and has assisted in leading litigation efforts against the gun industry. Allan Rostron – Biography, Univ. of Missouri-Kansas City School of Law, http://www.law.umkc.edu/faculty/rostron.htm (last visited Nov. 3, 2006). Professor Rostron's work on market share liability was recently cited by the Wisconsin Supreme Court in its *Thomas* decision. *See Thomas*, 2005 WI 129, ¶ 141, 285 Wis. 2d 236, ¶ 141, 701 N.W.2d 523, ¶ 141.

124. *See* Rostron, *supra* note 15, at 155–56.

125. *See id.* at 215.

126. *Id.*

127. *Collins*, 116 Wis. 2d at 197–98, 342 N.W.2d at 52.

different levels of risk created by different amounts of the harm-causing ingredient.[128]

In situations where the tortfeasors are unknown, allowing the plaintiff to establish the fungibility requirement of the plaintiff's prima facie case by showing the product is "factually similar" to *Collins* will expand the usefulness of a theory that, until *Thomas*, only effectively applied to DES cases. The plaintiff will still need to prove the elements of strict liability or negligence,[129] depending on what the plaintiff is alleging, but the plaintiff will be able to go forward with the case and have the opportunity to seek a remedy.[130] In other words, the use of risk contribution theory does not absolve the plaintiff from proving causation.

A common criticism of using risk contribution theory for lead paint cases is that the injury caused by lead is not a unique injury and could occur from many different sources, such as social or environmental sources, lead in other products, or heredity.[131] The *Thomas* court acknowledges this possibility by stating that the plaintiff must still prove the white lead carbonate actually caused the injuries.[132] A recent article by Professor Donald G. Gifford stated, "*Thomas v. Mallett* could turn out to be the most direct and important challenge to the individual causation requirement yet."[133] Gifford and the *Thomas* dissent both misinterpret the majority's expansion of risk contribution theory as an eradication of the causation requirement. Their interpretation is simply not true. In fact, the majority acknowledged that the defendant will have "ample grounds to attack and eviscerate" the plaintiff's claims

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128. *See id.* at 198–99, 342 N.W.2d at 52–53; WIS. STAT. § 895.045 (2003–2004).

129. *See* Thomas v. Mallet, 2005 WI 129, ¶¶ 161–62, 285 Wis. 2d 236, ¶¶ 161–62, 701 N.W.2d 523, ¶¶ 161–62.

130. *See id.* ¶ 161–63, 285 Wis. 2d 236, ¶¶ 161–63, 701 N.W.2d 523, ¶¶ 161–63.

131. Santiago v. Sherwin-Williams Co., 782 F. Supp. 186, 192 (D. Mass. 1992).

132. *Thomas*, 2005 WI 129, ¶ 156, 285 Wis. 2d 236, ¶ 156, 701 N.W.2d 523, ¶ 156.

133. Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 905 (2005). He continues by quoting the *Thomas* dissent:

> The end result of the majority opinion is that the defendants, lead pigment manufacturers, can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market .... [N]one of these facts seem to matter to the majority.

Id. (quoting *Thomas*, 2005 WI 129, ¶ 177, 285 Wis. 2d 236, ¶ 177, 701 N.W.2d 523, ¶ 177 (Wilcox, J., dissenting)).

based on the plaintiff's need to prove causation.[134] Also, the majority accounted for the possibility that some manufacturers may not have been a part of the market at the relevant time; therefore, the defendant has the opportunity to exculpate itself if it was not part of the market at the relevant time.[135]

V. RISK CONTRIBUTION THEORY: A STATUTORY RESPONSE

In quick response to the *Thomas* decision, the Wisconsin legislature enacted a statute relating to actions against manufacturers, distributors, sellers, and promoters of products that would limit the scope of *Thomas*.[136] The statute was approved by the State Senate and State Assembly in approximately four and five months, respectively, after the decision by the Wisconsin Supreme Court.[137] Wisconsin Governor Jim Doyle has since vetoed the bill, but still faces a "showdown in the Legislature."[138] The proposed statute required the claimant to prove the manufacturer actually manufactured the specific product alleged to have caused the harm; or, if the claimant could not prove this, the manufacturer would be liable if the claimant could prove that (1) no other legal process exists in which the claimant can seek redress for the claimant's injury; (2) the claimant suffered an injury caused by a product chemically identical to the specific product alleged to have caused the claimant's injury; (3) the manufacturer manufactured the product that is chemically identical to the specific product that caused the claimant's harm; (4) the product was manufactured in the state during the time period in which the product that caused the claimant's injury was manufactured; and (5) the defendants named in the action collectively manufactured at least eighty percent of all products sold in the state chemically identical to the product that caused the harm during the relevant time period.[139] This proposed statute also would have limited the time period for liability; specifically, a manufacturer would not be liable if more than twenty-five years have passed since it manufactured its last "chemically identical" product.[140]

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134. *Thomas*, 2005 WI 129, ¶ 163, 285 Wis. 2d 236, ¶ 163, 701 N.W.2d 523, ¶ 163.

135. *Id.*, 285 Wis. 2d 236, ¶ 163, 701 N.W.2d 523, ¶ 163.

136. Wisconsin Jobs Preservation Act, S.B. 402, 97th Leg., Reg. Sess. (Wis. 2005).

137. Thom Wilder, *Toxic Substances: Veto Urged of Wisconsin Bill Giving Immunity to Paint Companies in Lead-Poisoning Case*, CHEM. REG. DAILY, Dec. 27, 2005.

138. Johnson, *supra* note 35.

139. Wis. S.B. 402.

140. *Id.*

In the drafting records, Senior Legislative Attorney Robert P. Nelson expressed confusion over the legislature's use of "chemical identity," asking whether this terminology limited products based on their chemical composition.[141] The response to Attorney Nelson's question consisted of the statement that "chemically identical" was "simply a definition of fungibility" which "reflects what the court did in the *Collins* case."[142] If "chemical identity" was based on chemical composition only, for products such as lead carbonate that are not chemically identical as a whole but contain an identical harm-causing element (and otherwise meet the *Thomas* court's standards of fungibility), this requirement would effectively disallow the use of risk contribution theory for this product. *Collins* was more concerned about the risk that DES created rather than the fact that DES was chemically identical.

The statute also alters how liability is apportioned after the defendants are initially found. For multiple tortfeasors found negligent, they would only be severally liable, not jointly liable.[143] This change would mean that each tortfeasor is only liable for his or her proportionate share. This would change how fault was originally apportioned based on the comparative negligence statute, which states that if a defendant is less than fifty-one percent negligent, then the defendant is only liable for the defendant's portion of fault; yet, if a tortfeasor is more than fifty-one percent negligent, the tortfeasor will be jointly and severally liable with other tortfeasors.[144]

Some opponents feared the statute because of the time limits it would set on the tortfeasors, which could bar a plaintiff from naming certain defendants.[145] Also, in addition to the time limit barring certain defendants, requiring the named defendants to have collectively manufactured at least eighty percent of all products sold in the state chemically identical to the product that caused the harm during the relevant time period creates a very high standard that could effectively render risk contribution theory unworkable, especially if certain defendants needed to make up the eighty percent are barred due to time limitations or have gone out of business. In vetoing the proposed

141. Robert P. Nelson, Drafter's Note from the Legislative Reference Bureau, No. LRB-3756 (Oct. 6, 2005) (on file with author).

142. Response to Drafter's Note LRB-3756 to Robert P. Nelson (Oct. 11, 2005) (on file with author).

143. Wis. S.B. 402, § 1(6).

144. WIS. STAT. § 895.045 (2003–2004).

145. *See* Wilder, *supra* note 137.

legislation, Governor Doyle focused on public policy, stating "I cannot sign a law that closes the doors of justice to children who have been poisoned."[146] Supporters of the bill argued that the *Thomas* decision has created a "guilty even if you're innocent" standard detrimental to manufacturers.[147]

It is unclear how the changes proposed by this statute would limit the scope of *Thomas* because the legislature apparently defined fungibility based on *Collins*, which was the root of the definition of fungibility in *Thomas*. Utilizing the same definition articulated in *Thomas*, this statute would only limit the scope of *Thomas* in the restrictions on the time period in which a manufacturer can be held liable, the need to name enough defendants to cover eighty percent of the market, and on how final fault is apportioned between the negligent tortfeasors. Even with the *Thomas* definition of fungibility intact, these changes would undoubtedly limit many of the defendants that an injured plaintiff could sue or bar the injured plaintiff from suing altogether, but it would not altogether disallow risk contribution to expand to other goods.

Therefore, concerning the definition of fungibility as an element of the plaintiff's prima facie case, the legislature failed to change the Wisconsin Supreme Court's definition in *Thomas* by using the term "chemically identical" to define the product. Without changing the meaning of fungibility, the legislature is faced with the court's argument in *Thomas*—chemical identity does not determine fungibility.[148] Therefore, even if this bill, or a similar bill, eventually becomes law, risk contribution theory could still be available for products beyond DES.

VI. CONCLUSION

Theories of liability based on apportionment by market share began with the DES cases, where plaintiffs were remediless because of an "invisible" defendant. In Wisconsin, this theory was first articulated and utilized in *Collins*. It took twenty-one years for the Wisconsin Supreme Court to revisit risk contribution theory after two unsuccessful attempts at the court of appeals by plaintiffs who tried to extend the theory to

146. Johnson, *supra* note 35.

147. *See* Memorandum from Wis. Mfrs. & Commerce, *supra* note 35.

148. *See* Thomas v. Mallett, 2005 WI 129, ¶ 140, 285 Wis. 2d 236, ¶ 140, 701 N.W.2d 523, ¶ 140.

products beyond DES.[149] With *Thomas*, the Wisconsin Supreme Court refined the test for fungibility first articulated in *Collins* and showed that to be "factually similar," a product must be a fungible good.[150] To be fungible, the product must be functionally interchangeable and physically indistinguishable, and there must be a uniformity of risk.[151] The Wisconsin Supreme Court restated the *Collins* test in a more useable form that will allow the theory to expand to more products beyond DES and lead carbonate. Because of the element of uniformity of risk and its potentially broad application, the idea of a fungible good extends well beyond the definition articulated in the UCC and will have expansive use in tort law. The *Thomas* decision was groundbreaking in tort law and, through the clear and precise definition of fungibility articulated by the *Thomas* court, risk contribution theory has the opportunity to expand well beyond the scope of DES. The iceberg has finally emerged.

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149. *See* Rogers v. AAA Wire Prods., Inc., 182 Wis. 2d 263, 513 N.W.2d 643 (Ct. App. 1994); Drezdzon v. AAA Ins. Co., No. 84-273, 1984 WL 180237 (Wis. Ct. App. Oct. 12, 1984).

150. *Thomas*, 2005 WI 129, ¶¶ 145–49, 285 Wis. 2d 236, ¶¶ 145–49, 701 N.W.2d 523, ¶¶ 145–49.

151. *Id.*, 285 Wis. 2d 236, ¶¶ 145–49, 701 N.W.2d 523, ¶¶ 145–49.

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